

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 20-22476-mg

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5 In the Matter of:

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7 FRONTIER COMMUNICATIONS CORPORATION,

8

9 Debtor.

10 - - - - - x

11 United States Bankruptcy Court

12 One Bowling Green

13 New York, NY 10004

14

15 May 29, 2024

16 3:00 p.m.

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21 B E F O R E :

22 HON MARTIN GLENN

23 U.S. BANKRUPTCY JUDGE

24

25 ECRO: JONATHAN

1 HEARING re Discovery Conference Using Zoom for Government
2 (Doc # 2353, 2354, 2360)

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Transcribed by: Sonya Ledanski Hyde

1 A P P E A R A N C E S :

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3 CULPEPPER LP LLC

4 Attorneys for Badhouse Studios LLC

5 75-170 Hualalai Road, Suite B204

6 Kailua Kona, HI 96740

7

8 BY: KERRY STEVEN CULPEPPER

9

10 DAY PITNEY LLP

11 Attorneys for the Debtor

12 195 Church Street, 15th Floor

13 New Haven, CT 06510

14

15 BY: JOSHUA W. COHEN

16 JONATHAN TROPP

17

18 DAY PITNEY LLP

19 Attorneys for the Debtor

20 225 Asylum Street

21 Hartford, CT 06103

22

23 BY: MATTHEW LETTEN

24

25

1 LAW OFFICE OF GREGORY A. FERREN

2 Attorneys for MCC

3 92-1063 Koio Drive, Apt. C

4 Kapolei, HI 96707

5

6 BY: GREGORY A. FERREN

7

8 MORGAN LEWIS BOCKIUS LLP

9 Attorneys for Record Company Claimants

10 101 Park Avenue

11 New York, NY 10178

12

13 BY: MICHAEL LUSKIN

14

15 OPPENHEIM ZEBRAK LLP

16 Attorneys for Record Company Claimants

17 4530 Wisconsin Avenue NW, 5th Floor

18 Washington, D.C. 20016

19

20 BY: MATTHEW J. OPPENHEIM

21

22

23

24

25

1 AKERMAN LLP

2 Attorneys for the Debtor

3 750 9th Street NW, Suite 750

4 Washington, D.C. 20001

5
6 BY: ILDEFONSO MAS

7
8 ALSO PRESENT:

9 LAUREN BERGELSON

10 STEPHAN E. HORNUNG

11 ALEXANDER KAPLAN

12 COREY MILLER

13 CARLY KESSLER ROTHMAN

14 STANLEY A. TWARDY, JR.

15 UDAY GORREPATI

16 TAYLOR HARRISON

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1 P R O C E E D I N G S

2 CLERK: Calling the matters on May 29, 2024 at 3
3 p.m. Calling Frontier Communications Corporation, Case No.
4 20-22476. If we could please have appearances.

5 MR. CULPEPPER: Kerry Culpeper appearing on behalf
6 of the movie company claimants along with co-counsel Gregory
7 Ferren.

8 CLERK: Thank you. Go ahead.

9 MAN: Someone.

10 MR. OPPENHEIM: Hi, this is Matt Oppenheim. It
11 sounds like you were calling for appearances.

12 CLERK: Yes, I am.

13 MR. OPPENHEIM: I appeared after you called for
14 appearances. So, sorry about that. Matt Oppenheim on
15 behalf of the RCCs and I believe several of my colleagues
16 will be dialing in. And co-counsel, I see, is online. He
17 may have already entered an appearance, Mr. Lusken, I don't
18 know.

19 MR. LUSKIN: Michael Luskin, Morgan Lewis, for the
20 record company claimants. Thank you, Matt.

21 CLERK: All right, do we have any additional
22 appearances?

23 MR. COHEN: Joshua Cohen for Frontier.

24 CLERK: Okay.

25 MR. LETTEN: Matthew Letten for Frontier.

1 CLERK: Thank you. Are those all the appearances
2 at this time?

3 MR. CULPEPPER: Those are all the appearances on
4 behalf of the movie company claimants.

5 CLERK: Okay. Are there any additional parties
6 that are speaking on the record this afternoon?

7 MR. COHEN: I think Attorney Tropp and Attorney
8 Twardy are -- joined. I think they're just trying to unmute
9 themselves, but they'll be appearing on behalf of Frontier.

10 CLERK: Thank you. All right. I'm going to pause
11 for now and I'll be back in a few.

12 (Pause)

13 CLERK: If any parties are speaking on the record
14 this afternoon and have not given their appearance yet,
15 please unmute and state your appearance for the record.

16 Again, are there any parties that have not given
17 their appearances yet?

18 MR. COHEN: I believe that my -- our colleagues,
19 Mr. Tropp and Mr. Twardy in -- are still having trouble
20 getting their audio to work.

21 THE COURT: I see. Okay. Anyone else on the line
22 at this time that would like to make an appearance?

23 MR. MAS: Good afternoon. Ildefonso Mas from the
24 law firm of Akerman LLP on behalf of Frontier
25 Communications, and I do not plan on speaking today.

1 CLERK: Okay, thank you.

2 MR. COHEN: I'm advised that Mr. Tropp and Mr.
3 Twardy are working to get the audio resolved.

4 CLERK: All right, thank you. All right, you can
5 pause for now.

6 (Pause)

7 CLERK: Start the recording. All right, this is
8 the final call for appearances.

9 MR. TROPP: This is Jonathan Tropp of Day Pitney
10 for Frontier.

11 MR. TWARDY: And Stanley Twardy from Day Pitney
12 for Frontier also.

13 CLERK: Thank you.

14 MR. TWARDY: We apologize for the audio problem.

15 CLERK: No problem. Are there any additional
16 appearances?

17 MR. OPPENHEIM: On behalf of the record company
18 claimants, my colleagues, Alex Kaplan, Lauren Bergelson,
19 Carly Rothman, and Corey Miller are also on the line.

20 CLERK: All right, thank you.

21 MR. OPPENHEIM: Sorry, as is Audrey Adu-Appiah.

22 CLERK: Thank you.

23 MR. FERREN: And my name is Greg Ferren. I work
24 with Kerry Culpepper representing the movie company
25 claimants.

1 CLERK: Okay. Thank you. All right, I believe
2 that's everyone. We're not waiting on anyone; is that
3 correct?

4 MR. COHEN: It's correct. From Frontier.

5 CLERK: Frontier. Okay.

6 THE COURT: All right. This is Judge Glenn. Can
7 everyone hear me? Because I'm having some problems with my
8 audio equipment this afternoon.

9 MR. OPPENHEIM: Yes, Your Honor

10 MR. TROPP: Yes, Your Honor.

11 THE COURT: All right. So, we're obviously here
12 in connection with a discovery conference in Frontier, 20-
13 22476. Let me hear from Mr. Oppenheim first. Go ahead.

14 MR. OPPENHEIM: Good afternoon, Your Honor. I
15 believe we have two issues before us today. The first is an
16 issue with respect to privilege and the other is an issue
17 with respect to Frontier's responses to the RCC's request
18 for admission, and with your permission, I'll address the
19 privilege issue first and then allow any response on that
20 issue before turning to the RFA issue.

21 Your Honor, on the --

22 MR. TROPP: Your Honor? I'm sorry to interrupt.

23 THE COURT: Don't interrupt, please.

24 MR. TROPP: It's -- I was seeking a point of
25 clarification if I may?

1 THE COURT: What's your point of clarification?

2 MR. TROPP: Thank you, Your Honor. Jonathan Tropp
3 for Frontier. My understanding is that the only issue on
4 the agenda for today is --

5 THE COURT: Mr. Tropp --

6 MR. TROPP: -- the privilege issue --

7 THE COURT: I don't want to hear any more from you
8 right now. Mr. Oppenheim, please go ahead. Don't interrupt
9 someone when they're speaking.

10 MR. TROPP: I apologize.

11 THE COURT: Go ahead, Mr. Oppenheim.

12 MR. OPPENHEIM: Thank you, Your Honor. As our --
13 sorry, I'm getting a little echo. Just a moment. As our
14 submission, I believe sets forth, Your Honor, Frontier in
15 response to the RCC discovery request promulgated a very,
16 very, very extensive privilege list that included, I
17 believe, well, over 1,800 documents, and many of which the
18 record company plaintiffs have significant concerns with.
19 And we believe that notwithstanding the response by Frontier
20 to our letter in which they agreed with us on the legal
21 principles that they are -- their approach to addressing
22 privilege here is fundamentally flawed for two reasons.

23 First, that we don't believe that there is an
24 attorney-client or work product privilege in the first
25 instance, for many of these documents. We believe that

1 these documents were related to the business operations of
2 Frontier do -- and do not rise to the level of meriting
3 privilege protection.

4 Secondly, even if they were to rise to the level
5 of being privileged, either under attorney -- as an
6 attorney-client communication or as work product, we believe
7 that Frontier has waived that privilege under the clear
8 Second Circuit law here. So, if I may address each of those
9 in turn, Your Honor.

10 So, in the first instance, Frontier tells us that
11 they don't dispute the principle that implementing a repeat
12 infringer policy is a business operation and not legal
13 advice. And that is, it's useful that they agree with us on
14 the principle. There -- then the application of this
15 principle to their documents, we believe, has been drawn
16 much, much too narrowly because Frontier's application of
17 their policy does not -- is not limited to just whether or
18 not they terminated a specific infringer.

19 The question -- the questions at issue in this
20 case go far deeper. It's how did they respond to
21 infringement notices generally, what was their process, both
22 generally and specifically with respect to particular
23 infringers. And on that front, what we see over and over
24 and over again is that Frontier will put forward the fact
25 that they claim that they terminated somebody but refuse to

1 disclose any of the discussion that went into the decision
2 to terminate them, or they will show us that they didn't
3 terminate somebody and refuse to show us whether -- why they
4 decided not to terminate.

5 And finally, there are many, many documents
6 withheld on the (audio glitch) which speak to their process
7 internally for dealing with infringement notices and what
8 their thinking was when they set up the system and when they
9 received the notices. The caselaw coming out of the Second
10 Circuit gives us guidance here.

11 The In re: County of Erie case tell us that the
12 question of when a lawyer is functioning as a lawyer as
13 opposed to something else can be determined by looking at
14 whether there was legal advice provided. And legal advice
15 involves the interpretation and application of legal
16 principles to guide future conduct or to assess past
17 conduct. It requires a lawyer to rely on legal education
18 and experience to inform judgment.

19 Now, in the case of Frontier, Mr. Paul Garcia is
20 the gentleman who is in the center of all of this. Mr.
21 Garcia, from all we can tell, built and operated Frontier's
22 entire repeat infringer system and Frontier acknowledges
23 this in their response. And they say, well, Mr. Garcia wore
24 multiple hats. On the one hand, he was on the DMCA
25 committee. On the other hand, he's also responsible for

1 overseeing litigation.

2 Well, let's break that down, Your Honor. With
3 respect to Mr. Garcia's role on the DMCA committee, that's a
4 role that's not typically handled by a lawyer at other ISPs.
5 And we've seen this in other cases. The individual who's
6 responsible for running the program to respond to
7 infringement notices has typically been somebody who doesn't
8 need legal training, because it's not -- it's a business
9 function. It's not a legal function.

10 It -- there is nothing within the Digital
11 Millennium Copyright Act or any of the law that tells you
12 how you should build and operate your repeat infringer
13 program. So, when Mr. Garcia is investigating what a repeat
14 infringer's history is and discussing whether to terminate
15 that subscriber, he's neither applying legal principles to
16 guide conduct nor using anything that would -- he would have
17 learned in law school, that's for certain.

18 THE COURT: May I ask you this --

19 MR. OPPENHEIM: Yes.

20 THE COURT: -- Mr. Oppenheim? Are there -- are
21 minutes kept of meetings of the DMCA committee?

22 MR. OPPENHEIM: So, the answer is, we are not
23 aware of minutes kept. We are aware that Mr. Garcia
24 apparently took extensive notes on yellow legal pads. None
25 of those have been produced. We have been told that they

1 are nonresponsive and so we have not seen any of them.

2 THE COURT: How are the decisions of the DMCA
3 committee documented?

4 MR. OPPENHEIM: We do not know, Your Honor. We
5 know that there is documentation going into the meeting
6 where non-lawyers are asked to prepare spreadsheets that
7 identify either 10 or 15 subscribers who will be eligible
8 for potentially being terminated. And for most of the
9 period as we understand it right now, for the claims in this
10 case, Frontier capped the number of subscribers it would
11 potentially terminate at 10 or 15 each quarter. And so,
12 they would get this spreadsheet of the 10 or 15 worst
13 offenders, and that that would be the basis for the
14 discussion at the quarterly meeting.

15 Now, we've been told that there's this DMCA
16 committee in correspondence with opposing counsel, but when
17 we asked individuals in deposition who were apparently on
18 this DMCA committee if they were on it, they all say, what
19 is the DMCA committee? What is the DMCA team? So, I don't
20 even know that it uses that name, Your Honor, but it was a
21 group of individuals who met each quarter. It was run by
22 Mr. Garcia and he apparently made almost all of the
23 decisions.

24 THE COURT: Do you know who the members of what
25 may be called a committee and may not be called a committee?

1 MR. OPPENHEIM: We know who we believe attended
2 the meetings, Your Honor. How's that for an answer? And
3 we've taken the deposition of two of them, I believe. I'm
4 just making sure I get the numbers right.

5 THE COURT: How many (indiscernible) meeting?

6 MR. OPPENHEIM: I believe at most we've -- and I
7 believe the, the individuals may have changed slightly over
8 time, but I believe we've identified a total of five people
9 who may have been involved. But some came and went.

10 THE COURT: Have you received any documents that
11 show who the members of the committee were at various points
12 in time?

13 MR. OPPENHEIM: No, Your Honor. Nothing that
14 clear.

15 THE COURT: Have you asked for it?

16 MR. OPPENHEIM: We have certainly asked for all of
17 the documents related to this, the quarterly meetings and
18 the DMCA team. Yes, we have, Your Honor.

19 THE COURT: Let me -- here, let me try and cut
20 through this. I'll let you continue with your argument in a
21 minute. I mean, I've always found, even when I was in
22 practice, that the most difficult -- among the most
23 difficult privilege issues was when a lawyer wore two hats,
24 business hat and a lawyer. When I read the letters from
25 each side, they purport to rely on the same legal principles

1 and it seems to me that these issues may really be factual.
2 I don't know how many members of the committee. I don't
3 know -- do they document -- when a decision is made to
4 terminate a subscriber, how is that decision documented? Do
5 you know that, Mr. Oppenheim?

6 MR. OPPENHEIM: We know that there is somebody
7 from a different group than the technical group and a
8 different group from the legal group that's tasked with
9 implementing the termination. We know that that -- the
10 people from that group who participate in the meeting say
11 they exercise no judgment at the meeting. They don't even
12 often read the documents before the meeting, and the -- the
13 task of actually terminating the subscribers takes less than
14 five minutes.

15 THE COURT: So, is there some document prepared
16 that explains the reasons for terminating or not terminating
17 people who are considered at meetings?

18 MR. OPPENHEIM: You just hit the heart of the
19 issue, Your Honor. In other cases, what we have seen is
20 that ISPs will have a number of notices at -- that you hit a
21 number of notices and then a subscriber is terminated. Now,
22 that that number may have changed over time. They may have
23 counted notices differently. Put all that issue aside, they
24 had some threshold that if you were the subject of, say, in
25 Cox's case, you know, it started at seven, but then they

1 went up to 13, over time. Notices, at 13 notices you were
2 terminated.

3 Frontier has no threshold at which you are
4 terminated. We know -- and this will come out when we
5 discuss the RFAs, Your Honor. They had policies at which
6 there were a certain number of notices that would trigger an
7 email notification to the subscriber though that email
8 notification rarely went to the subscriber, we understand.
9 And then they had what was called a walled garden at 100
10 notices, which was later reduced, I believe, to 50 notices.

11 And then -- but termination would only happen
12 because of the quarterly meetings. And presumably it was
13 the 10 or 15 worst offenders who would all be well over 100
14 notices. The circumstances which would determine whether or
15 not somebody was terminated is entirely in Mr. Garcia's
16 head, from what we can tell, and the only way we can
17 determine whether he exercised those -- that authority in
18 any rational way is to see the documents.

19 So, if you look, for example, Your Honor, at some
20 of the attachments to our letter and we've shown some of the
21 redactions -- so these are not documents where they withheld
22 the entire document, but some of the redactions -- what you
23 see is that they're withholding the actual discussion about
24 what to do with the subscriber. They'll show that there's
25 an issue with respect to a subscriber and they'll show the

1 ultimate outcome, but the entire internal discussion, they
2 have redacted.

3 So, Exhibit C for example, Your Honor, which is --
4 I'll put -- give a Bates number just so it's clear on the
5 record. I believe it starts with Frontier 00036728. Is an
6 email exchange that starts with something from Mr. Elmore
7 who was on the -- we believe on the DMCA committee, a
8 critical person from the IT side, emailing -- strike that,
9 I'm sorry.

10 It starts with Mr. Garcia. Looks like it was sent
11 to Mr. Elmore and there's back and forth, the entirety of
12 which is redacted. All of the initial emails are redacted
13 and then what you see later is a discussion about certain
14 customers that they are considering for termination.

15 THE COURT: Let me stop you there. How many
16 members of the committee have you deposed?

17 MR. OPPENHEIM: One of the -- so, I believe one,
18 Your Honor, and one for just document custodian purposes,
19 his substantive deposition will be happening, I believe next
20 week.

21 THE COURT: I -- the custodian's deposition is
22 taken next week or the member's deposition is next week?

23 MR. OPPENHEIM: We took one member substantively
24 and this is the person -- this is the individual whose team
25 was responsible for effectuating the terminations. She knew

1 nothing.

2 THE COURT: When you say she knew nothing, did you
3 ask her what the reasons were for terminating subscribers?

4 MR. OPPENHEIM: She -- Your Honor, she didn't even
5 know what the policy was. She didn't get involved in it.

6 THE COURT: -- question. You deposed her. She
7 was at meetings. You -- and I take it she was at meetings
8 when a decision was made to terminate subscribers; is that
9 correct?

10 MR. OPPENHEIM: Yes, I believe she was, Your
11 Honor. Or one of her (indiscernible).

12 THE COURT: Did you ask her why decisions were
13 made to terminate subscribers?

14 MR. OPPENHEIM: I didn't ask it like that, Your
15 Honor. I asked her to describe the meetings and she
16 couldn't recall anything about them. And so -- and she had
17 no -- and I don't -- while other witnesses we've had issues
18 with where their spotty recollection seems convenient, with
19 her I believe it was completely forthcoming and honest. And
20 she literally said she --

21 THE COURT: (indiscernible). Where's his office?
22 Where's Mr. Garcia's office?

23 MR. OPPENHEIM: In Connecticut, Your Honor, I
24 believe.

25 THE COURT: Mr. Oppenheim, here's my problem in

1 resolving this issue. Look, I've read the cases you've
2 cited in your letter. I dealt with this issue years ago in
3 practice. And I always thought that one of the most
4 difficult issues -- and, you know, fundamentally, I think
5 Frontier doesn't really dispute the legal principles. When
6 you have a lawyer sitting on a business committee that
7 making -- that's making decisions, the lawyer's wearing two
8 hats.

9 It may be that some of what the lawyer says to the
10 committee, to other committee members is legal advice and
11 some of it reflects a business decision. If he's a member
12 of the committee and has a vote on the committee, he's
13 acting in the capacity as a businessman, it's not privilege.
14 And I don't feel that I have enough facts to resolve this
15 dispute, which really raises the question, what do I do now?

16 So, one point I've been considering, I'm not ready
17 to order yet, is, yes, you know, you're -- so I have in
18 front of me your May 13th letter. And you know, you talk
19 about some of what happened. You cite some legal authority.
20 I'm familiar with some of these cases. I've read other
21 cases, you know, leading up to today and I don't -- I'm --
22 you know, what I'm inclined to do is give both sides a
23 relatively short time to file one additional round of letter
24 briefs addressing the issue of privilege where a lawyer is
25 also serving in a business capacity.

1 And, you know, I would say, take Mr. Garcia's
2 deposition. I mean, I -- (indiscernible) bring him to
3 Court. Let him sit in the witness chair. Ask his questions
4 and -- but take his deposition. I'll read the transcript.
5 If they assert privilege as a basis for not answering, I'll
6 resolve it.

7 So, look, I'm reading from your May 13th letter on
8 page 2. You say, in the third full paragraph, "Frontier's
9 assertion of privilege is unfounded for four reasons.
10 First, Frontier's internal communications regarding its
11 business decisions, implementing its repeat infringer policy
12 are not privileged because they are not legal advice."

13 Well, that may be right. It may not. The
14 attorney -- and reading on. The attorney-client privilege
15 is, "triggered only by a client's request for legal as
16 contrasted with business advice."

17 Yes, I've read the Second Circuit's grand jury,
18 you know, subpoena decision that you cite. And then you go
19 on and say communications with counsel "that principally
20 involved the performance of nonlegal functions by an
21 attorney are not protected." You cite ABN Amro, the
22 District Court decision. I've read that. And that may be
23 the situation here, it may not. I don't know. I'm not
24 satisfied by it.

25 Yes, and you go on in the next paragraph to talk

1 about the Cox Communicate -- Fourth Circuit Cox
2 Communications decision. And I've read that multiple times,
3 including I looked back at it today. So, I'm in a bit of a
4 loss. It seems -- look, I rarely try, as you've all
5 experienced so far, I try to resolve discovery disputes in
6 Zoom hearings like this.

7 And I think I probably have said to you all
8 because I've said this to others in other cases, sometimes
9 when the issues are privilege issues, I'll ask the parties
10 to file letter briefs addressing the issues and we'll have
11 another hearing. And I -- while Frontier has alluded to the
12 legal principles that apply, I don't think they've applied
13 and attempted to apply them to the facts here.

14 And what I don't -- I try to avoid, and it may be
15 unavoidable in this, is, you know, I told you a couple of
16 times on other issues, go take the deposition and sometimes
17 you have. Okay? I'm -- and I've expressed this before.
18 I'm very concerned by the amount of time this case is taking
19 to move forward. But you know, whether it's Mr. Garcia or
20 one other member of -- serve a 30(b)(6).

21 If you serve a 30(b)(6) notice and they tender a
22 witness on the DMCA committee and you list the topics you
23 want to talk about and they serve somebody who doesn't know
24 anything about it, well, that's going to wind up with
25 sanctions. Okay? They better -- you serve a 30(b)(6) notice

1 and you identify the specific topics, they better provide
2 you with a witness with knowledge.

3 And if you want, take Mr. Garcia's deposition. I
4 mean, I think it's always a difficult problem for me as a
5 judge and it was as a lawyer when I had lawyers wearing two
6 hats. That's a fact intensive issue that I don't feel
7 comfortable weighing in on, on really just a bunch of
8 letters. I don't have a factual record on which to do it.
9 I'm troubled on this and some other things we'll talk about
10 in a little while, about seemingly most issues being dragged
11 out here with letter writing wars, et cetera.

12 And there may be on some other issues, I'm going
13 to put a stop to it. But this is a serious issue. I mean,
14 look, the one thing that's clear -- Frontier better
15 understand this -- as the record now stands, I may not
16 permit Mr. Garcia to testify, period, at trial. Okay?
17 They're not going to sit back and refuse production of
18 information and letters and then turn around and they've
19 suggested, well, they plan to call him at trial. And I just
20 may not permit it. And who they're going to put up, I don't
21 know. But we're not at that point yet.

22 I think reluctantly, I don't feel I can resolve
23 this issue today based on the correspondence. You both pay
24 lip service to the same legal principles. And the dispute
25 is, what hat was Mr. Garcia wearing when he did what? So,

1 if there's no documentation, I mean, look, I would think
2 that if they're going to terminate subscribers, somebody has
3 got somebody who's not a lawyer has gotten notes about why
4 specific subscribers were terminated.

5 And all I can say is the RCC is entitled to know
6 exactly why. Okay, and it can't be because a lawyer said --
7 gave legal advice and consequently, we just decided to
8 terminate, but we won't tell you what the legal advice is.
9 What that may result in is I preclude everybody from
10 testifying from Frontier about it. Okay? There's got to be
11 a record on this. I'm not going to hesitate to issue
12 preclusion orders if they try to hold back.

13 I'm sure they're smart enough to know that they're
14 not going to suddenly say, all right, we're going to present
15 -- yes, during discovery, we asserted attorney client
16 privilege but we now want to call somebody as a witness to
17 testify about -- legally, that isn't going to happen. I
18 think they know that. But -- so, I'm just -- look, if you
19 want to take Mr. Garcia's deposition first, let them
20 instruct him not to answer, ask your questions.

21 Get a clear -- as clear a record as you can. I
22 will have you each file letter briefs addressing the
23 specific issues and we'll get it resolved quickly, but I
24 just don't feel like, based on the letters -- I read all
25 these letters. I got a pile of letters in front of me.

1 I've read all the cases you've cited. Some of them I'd read
2 before. I don't know what else to tell you, Mr. Oppenheim.
3 I just -- I -- look, I'm not ready today to say turn over
4 all of these alleged privileged documents to me for an in
5 camera review.

6 I've done that in other cases. I'm not prepared
7 to do that today. I will, if it comes to that, I will
8 consider appointing an expert on privilege. You know,
9 there's -- I'm not supposed -- bankruptcy judges in our
10 rules, we don't have rules on appointing special masters. I
11 think some of my colleagues have -- what they've done in the
12 past is, I can appoint an expert.

13 I can appoint an expert on attorney-client
14 privilege and ask that all documents be provided to the
15 expert for in camera review. I -- what I'm -- what I want
16 to do, Mr. Oppenheim, I don't want to put myself in the
17 position where I've read all this stuff in camera and then
18 somebody says, well, judge, you can't, you got to recuse
19 yourself. You can't try this case because you've been
20 exposed to this attorney-client privileged information.

21 So, I will seriously consider appointing an expert
22 to review and report and have the costs split initially and
23 then chargeable to whoever loses, you know.

24 MR. OPPENHEIM: Your Honor -- I'm sorry.

25 THE COURT: Go ahead, Mr. Oppenheim.

1 MR. OPPENHEIM: I have two really important points
2 to make, if I may. One on the deposition that you suggested
3 of Mr. Garcia and the other on waiver issue. And let me
4 start with the waiver issue. We actually disagree on the
5 law here, Your Honor. We don't agree. So, the critical
6 issue is that the way Frontier sees it is they cite to the
7 In re: Residential Capital case. It's one of your
8 decisions --

9 THE COURT: Oh, I -- yeah.

10 MR. OPPENHEIM: And it's a very limited New York
11 State law application of waiver. And what they're saying
12 is, at issue waiver only occurs when they're asserting a
13 defense where they're relying on the privileged materials.
14 And otherwise, it doesn't come into play, but that's not the
15 law for this case. This is a copyright case and federal law
16 applies and the Bilzerian case controls and that case
17 actually gives us a roadmap of how to handle this situation.
18 That case, Your Honor, the Second Circuit --

19 THE COURT: What case are you talking --

20 MR. OPPENHEIM: The Bilzerian case. It's --

21 THE COURT: What's the cite?

22 MR. OPPENHEIM: United States v. Bilzerian, sorry,
23 I'm -- 926 F.2d 1285.

24 THE COURT: Okay.

25 MR. OPPENHEIM: And this is a case where a

1 defendant wanted to come forward and describe his good faith
2 in how he structured certain securities transactions. Much
3 more your world, Your Honor, than mine. But I understood it
4 enough to say that when the Court said, that's fine, but if
5 you do that, the United States gets to inquire about what
6 you knew about what was right and wrong under the law in
7 your communications with your lawyers about how to structure
8 these things.

9 So, if you're going to testify as to good faith,
10 that opens the door and waives the privilege. And they
11 said, well, we're not going to rely on the privileged
12 communications and the Court said, it doesn't matter. You
13 have to give the opposing counsel the opportunity to see the
14 documentation and get the information to cross examine you
15 on your assertion of good faith.

16 And the Court speaks about the critical need to
17 not allow somebody to use, you know, attorney-client
18 privilege as both a shield and a sword, which is exactly
19 what is likely to happen here, if all we do is go forward
20 with a deposition. I have no doubt Mr. Garcia, as a well-
21 spoken, well-educated, well-heeled counsel is likely to in a
22 deposition, articulate reasonable grounds now for what he
23 did. But we have a right to see whether he actually did
24 that, because we don't think he did.

25 We think that if we see the documents, we will

1 have the opportunity to cross examine him on those decisions
2 and show that the yarn he spins is not accurate and just
3 taking his deposition -- and now I'm transitioning into my
4 second point, Your Honor -- doesn't accomplish the issue
5 here. Because he will get to say whatever he wants about
6 acting reasonably in appropriate circumstances. Here are
7 the factors we considered, Your Honor.

8 But if we look at the emails, we may see they
9 didn't look at those factors. They looked at other factors
10 or they didn't care. And we -- if they are going to assert
11 the safe harbor, they're putting their conduct at play.
12 They don't get to shield that conduct and those
13 communications about that conduct in privilege. And that's
14 what Bilzerian says.

15 THE COURT: What -- I just opened Bilzerian on my
16 screen. What page are you referring to?

17 MR. OPPENHEIM: Well, the discussion starts with
18 what happened at the trial on page -- let's see, what's the
19 pagination here. One moment. Sorry, Your Honor. There's a
20 heading called the trial which talks about that it was an in
21 limine motion, and it's -- for some -- oh, 1291, Your Honor.

22 THE COURT: All right, hold on.

23 MR. OPPENHEIM: -- by discussing the motion in
24 limine.

25 THE COURT: Give me -- all right, I'm on 1291.

1 Yeah. What are you pointing to?

2 MR. OPPENHEIM: So, where you -- this is just the
3 factual basis to understand what happened. In the section
4 titled, The Trial, it talks about at trial --

5 THE COURT: What page?

6 MR. OPPENHEIM: -- seeking a ruling permitting him
7 to testify.

8 THE COURT: What page?

9 MR. OPPENHEIM: This is the 12 -- I believe it's
10 1291, Your Honor, still.

11 THE COURT: Hold on. Give me a moment to switch
12 back.

13 MR. OPPENHEIM: There's a paragraph that starts,
14 "At trial, the defendant argued."

15 THE COURT: All right, challenges of the conduct
16 of the trial. Yeah.

17 MR. OPPENHEIM: Right. So, that's describing how
18 the issue arose. And then when you -- when you go forward,
19 Your Honor, to Page 1292 --

20 THE COURT: Yes.

21 MR. OPPENHEIM: -- there's a paragraph, it starts
22 with the word "however." "However, the attorney-client
23 privilege." It talks about sword and shield.

24 THE COURT: Yes. I'm there.

25 MR. OPPENHEIM: And it says that the defendant may

1 not use the privilege to prejudice his opponent's case or
2 disclose some selected communications for self-serving
3 purposes. Thus, the privilege may implicitly be waived when
4 the defendant asserts a claim that in fairness requires
5 examinations of the protected communication.

6 THE COURT: Well, that's the point. I'm not yet
7 persuaded that the privilege is being asserted in a way that
8 would prevent the Court from judging the fairness of the
9 policy and how it was implemented.

10 MR. OPPENHEIM: Well -- I'm sorry.

11 THE COURT: I don't know that right now. Okay? I
12 hear what you're arguing. I didn't read Bilzerian before
13 you just pointed it out to me. I'll make sure I read the
14 whole thing.

15 MR. OPPENHEIM: And if you go to the bottom of
16 1293, there's a paragraph that starts, "Bilzerian asserts."

17 THE COURT: Yes. "Bilzerian asserts the Court
18 ruled that even his own testimony regarding the steps he
19 took to change the structure of his financing arrangements
20 would waive the privilege."

21 THE COURT: Well, it might lead me to preclude
22 Garcia from testifying.

23 MR. OPPENHEIM: So -- well, so the analogy here --
24 and actually there is a perfect analogy, which is the
25 structure of their DMCA program. They want to put forward

1 that they had a structure to deal with DMCA infringement
2 notices, right? That at some point in time, they emailed
3 the subscribers. At some point in time, they built -- had
4 a, a walled garden. At some point in time, they would
5 consider termination.

6 They want to put this whole thing forward as their
7 defense both to the -- on the safe harbor and to liability.
8 And yet, they will not allow us to examine the documents
9 that show how they implemented that program. And it's
10 document after document after document. And if you look --,
11 and God knows, you don't really want to look at his
12 privilege list because it's enormous.

13 But document after document after document on that
14 privilege list is about the specific quarterly meetings.
15 It's about specific subscriber issues. It's not about, boy,
16 did you see that interesting decision on the DMCA which
17 would be potentially privileged -- potentially? It's about
18 how they implemented their program. So, you know, I can
19 take -- and we're scheduled to take Mr. Garcia's deposition.
20 He's been designated on the vast majority of subjects and
21 we're going to take his deposition on the last two days of
22 discovery.

23 It's been a puzzle trying to get all the
24 depositions in place, but we've done it, I think, and I'll
25 take his deposition. But without all of the documents to

1 examine whether or not his testimony is consistent with the
2 documents, we're essentially being forced to take a
3 deposition blindfolded. I can show you several documents,
4 Your Honor, if you like, that I think make the point.

5 THE COURT: Well --

6 MR. OPPENHEIM: -- you probably --

7 THE COURT: I'll give you a chance to argue
8 further, but let me hear from the other side first, okay?

9 MR. OPPENHEIM: Thank you, Your Honor.

10 THE COURT: Who's going to argue for Frontier?

11 MR. TROPP: Jonathan Tropp, Your Honor.

12 THE COURT: Go ahead.

13 MR. TROPP: I'm not sure what I might at this
14 point add to the conversation. I think that Your Honor is
15 exactly correct that the parties are espousing the same
16 principles and that Frontier has endeavored mightily to
17 apply those principles in an appropriate way. We are not
18 using the privilege as a sword and a shield.

19 THE COURT: Let me ask you --

20 MR. TROPP: This is a very, very --

21 THE COURT: How do you intend to defend Frontier's
22 DMCA policy?

23 MR. TROPP: Your Honor, we've produced thousands
24 of documents that show --

25 THE COURT: I didn't ask that question. I didn't

1 ask that question. Let's assume we go to trial next week.
2 How do you intend to try to persuade the Court as to the --
3 as to Frontier's DMCA policy, the reasonableness of it?

4 MR. TROPP: Through the testimony of Mr. Garcia
5 and others on the committee and the documents that --

6 THE COURT: Who else is on the committee? I want
7 -- give me the list of the names of the people on the
8 committee.

9 MR. TROPP: The three members of the committee who
10 in recent years have performed the function are Mr. Garcia,
11 Mr. Philippe Levan, and Mr. Josh Elmore.

12 THE COURT: Levan -- how do you spell Levan?

13 MR. TROPP: L-E-V-A-N.

14 THE COURT: Are Mr. Levan or Mr. Elmore lawyers?

15 MR. TROPP: No, sir.

16 THE COURT: And what do you anticipate Mr.
17 Garcia's testimony to be?

18 MR. TROPP: Mr. Garcia will discuss the structure
19 of the program and the way that it was implemented including
20 the fact that Frontier tracked notices of infringement,
21 evaluated the behaviors or accusations made against its
22 subscribers over the course of time. When subscribers came
23 to the attention of the committee for evaluation, there were
24 documents that were presented to the committee that
25 described the facts related to the subscriber's account and

1 the accusations made against the subscriber. The committee
2 met, discussed, and made decisions. There were no minutes
3 taken, Your Honor, and terminations when appropriate were
4 then performed.

5 THE COURT: Were the terminations documented? I
6 mean, was there anything in the record that showed the
7 reasons for decision to terminate?

8 MR. TROPP: No, Your Honor. They're not withheld.
9 They just don't exist.

10 THE COURT: And was it done by vote of the three
11 members of the committee, the decision to terminate?

12 MR. TROPP: It was done -- I apologize. It was
13 done in discussion. I'm not aware of formal votes. As I
14 said, there were no minutes taken. There's nothing recorded
15 that says this is a 2 to 1 vote.

16 THE COURT: And this is a business decision made
17 by the committee to terminate people because they violated
18 the Frontier's DMCA policy?

19 MR. TROPP: That's correct. And Mr. Garcia, Mr.
20 Levan, and Mr. Elmore will testify about it as asked.

21 THE COURT: Okay. And so mister -- no privilege
22 will be asserted as to Mr. Garcia's consideration of whether
23 or not to terminate any subscribers; is that correct?

24 MR. TROPP: That's correct.

25 THE COURT: Can you tell me how many subscribers

1 in total were terminated for violation of the DMCA policy?

2 MR. TROPP: I don't know the precise number, Your
3 Honor. It's --

4 THE COURT: Give me an approximate.

5 MR. TROPP: -- something around the order of 450
6 to 500.

7 THE COURT: And with respect to all of those 450
8 to 500 subscribers, Mr. Garcia, Mr. Levan, and Mr. Elmore
9 were the members of the committee that made the decision to
10 terminate; is that correct?

11 MR. TROPP: No, not entirely, Your Honor. In
12 recent years, that has been the committee. Mr. Garcia
13 joined the company in 2018. He assumed responsibility for
14 participation in the committee over time, and before that
15 John Greifzu, attorney John Greifzu was in that role --

16 THE COURT: Spell that.

17 MR. TROPP: -- and there were others.

18 THE COURT: How do you spell his last name?

19 MR. TROPP: G-R-E-I-F-Z-U.

20 THE COURT: Say it again. I'm sorry.

21 MR. TROPP: G-R-E-I-F-Z-U. Mr. Greifzu is
22 scheduled to be deposed on June 11th. Mr. Levan is
23 scheduled to be deposed on June 5th. Mr. Elmore -- I'm
24 sorry, Mr. Elmore is scheduled to be deposed on June 5th.
25 Mr. Levan is scheduled to be deposed on June 6th, I believe.

1 THE COURT: And so, there are no minutes that
2 reflect any of the discussions or reasons for the
3 termination of any of the subscribers; is that what you're
4 telling me?

5 MR. TROPP: There are no minutes that are being
6 withheld, Your Honor. There are no minutes.

7 THE COURT: I didn't ask if there were any being
8 withheld. Are there any minutes of any of the decisions of
9 the DMCA committee to terminate subscribers?

10 MR. TROPP: There are no minutes, Your Honor.

11 THE COURT: Are there any documents or minutes
12 that reflect any -- the reasons for not terminating
13 subscribers who were discussed at DMCA meetings?

14 MR. TROPP: I don't honestly know, but to the
15 extent that they exist, they would have been produced.

16 THE COURT: And I take it then that you agree that
17 the decisions of the DMCA committee, whoever the members
18 were at the time, to either terminate or not terminate are
19 business decisions that are not protected by attorney-client
20 privilege?

21 MR. TROPP: That is the position that we -- that
22 is the rule that we applied in evaluating privilege. Your
23 Honor, if I may, there are privilege issues that exist in
24 this case. Obviously, there's a lengthy privilege log.
25 It's important for the Court to understand that for the last

1 three years or so, this committee has also -- has been
2 operating within the context of a litigation. Mr. Garcia,
3 as has been discussed, wears more than one hat.

4 If he was performing his role on a DMCA committee,
5 we produced the documents. But Mr. Garcia sometimes came
6 out of the committee and had an idea about how he would like
7 to defend this case, and so he might have veered off from a
8 conversation about how to handle a particular subscriber and
9 asked for research to be done to support a legal theory.

10 THE COURT: Well --

11 MR. TROPP: -- with respect to the defense --

12 THE COURT: Were these discussions with other --
13 with the other committee members or were these discussions
14 between Mr. Garcia and other inside or outside counsel?

15 MR. TROPP: It could have been both, Your Honor.

16 THE COURT: Well, I certainly didn't understand
17 from your earlier remarks that any of the discussions
18 between Mr. Garcia and the other committee members were
19 attorney-client privileged communication. I specifically
20 asked whether his discussions with the committee members,
21 the other committee members, were business discussions as to
22 whether or not to terminate members. And you answered that
23 yes. You didn't say --

24 MR. TROPP: Yes --

25 THE COURT: -- those discussions were privileged

1 communications. You told me (audio glitch) they were
2 business decisions.

3 MR. TROPP: Your Honor, I understood your question
4 to be as you just stated it. If the discussion was with
5 respect to the termination of a subscriber, we treated that
6 and understood that to be a business decision and we did not
7 withhold it. If Mr. Garcia had a subsequent idea or a
8 related idea, not about the termination of a subscriber, but
9 about how to defend this litigation, that was treated as
10 work product and/or privilege. That's a different kind of
11 an analysis.

12 THE COURT: -- with the other committee members,
13 maybe?

14 MR. TROPP: Yes, Your Honor.

15 THE COURT: What position was Mr. Levan?

16 MR. TROPP: Mr. Levan is an engineer, as I
17 understand it.

18 THE COURT: What does he have to do with defending
19 this lawsuit?

20 MR. TROPP: Your Honor, Mr. Garcia depended upon
21 Mr. Elmore and Mr. Leon to provide to him facts about the
22 case. So, for example, if Mr. Garcia wanted to know not how
23 to treat Mrs. Jones and whether to terminate Mrs. Jones, but
24 how many people were like Mrs. Jones and what Frontier ought
25 to understand the implications of the fact that there were 1

1 or 500 or 5,000 like Mrs. Jones in order to understand the
2 claims being made against it in this case, Mr. Garcia would
3 turn to Mr. Elmore or to Mr. Levan and ask for them to help
4 him develop facts to assist in the defense of this
5 litigation.

6 THE COURT: What was Mr. Elmore's position or what
7 is Mr. Elmore's position?

8 MR. TROPP: I believe he's a network engineer.

9 THE COURT: Wasn't it a relevant consideration to
10 make a business decision whether to terminate a subscriber
11 to know how many other subscribers were similarly situated
12 with similar numbers of infringement notices? Isn't that a
13 business decision?

14 MR. TROPP: I don't believe that that was one of
15 the factors that was considered, but I can't tell you all
16 the things that the committee considered. I can tell you
17 that we would distinguish between when the committee does
18 that for the purpose of evaluating what to do with a
19 specific subscriber, in which case we would have produced it
20 or generated that information for the purpose of defending
21 this litigation, which -- in which case, we would have
22 withheld it.

23 THE COURT: How can you separate out? If this is
24 the committee that decides who to terminate and who not to
25 terminate, how can you separate out their discussions of oh,

1 my gosh, if we terminate him, we got 3,000 others, we got to
2 terminate, and that'll cost us a lot of money in revenue.
3 Why isn't that also a business decision?

4 MR. TROPP: That would have been, but we didn't
5 withhold anything like that, Your Honor.

6 THE COURT: Anything else you want to add, Mr.
7 Tropp?

8 MR. TROPP: One other, perhaps relevant piece of
9 information. So, in addition to the complex work product
10 issues in the case, in addition to the complexity of trying
11 to figure out which hat Mr. Garcia or Mr. Greifzu may have
12 been wearing at a particular moment in time, it is also true
13 that on occasion, especially early on, Frontier sought
14 advice from outside counsel with respect to how to handle
15 various issues.

16 We treated those issues as privileged because
17 outside counsel were not performing a business function and
18 if Frontier --

19 THE COURT: To whom did they deliver their advice?

20 MR. TROPP: I'm sorry, I missed your question,
21 Your Honor.

22 THE COURT: To whom did outside counsel deliver
23 their advice?

24 MR. TROPP: Outside counsel at Wiley Rein, David
25 Weslow communicated with Mr. Greifzu or Mr. Garcia.

1 THE COURT: Okay.

2 MR. TROPP: There may have been others who were
3 copied on some of those emails internal to Frontier.

4 THE COURT: Mr. Oppenheim, are you challenging
5 privilege for communications from outside counsel to inside
6 counsel?

7 MR. OPPENHEIM: That's a broad question, but I
8 will -- let me respond to the specific, narrow situation Mr.
9 Tropp, I believe, is speaking to. There are a series of
10 emails about a specific -- at least one specific subscriber
11 and what to do with respect to that subscriber who has been
12 the subject of, I believe, as I recall, hundreds of notices.
13 And out -- there's some back and forth on it with outside
14 counsel. The vast majority of the email (audio glitch).
15 And again, this is not, as far as I can tell, any
16 application of the law. It's the decision about how -- what
17 Frontier's policy is and how they're implementing.

18 THE COURT: Yeah, but -- or, you know, you confer
19 with outside counsel. They're going to want to know what's
20 -- what policy do you have? So, let me ask you this. Who
21 is the to and from for communications with outside counsel?
22 Is it with inside counsel?

23 MR. TROPP: Are you asking me, Your Honor, or Mr.
24 Oppenheim?

25 THE COURT: No, I'm asking -- Mr. Oppenheim is the

1 one who's raised this.

2 MR. OPPENHEIM: Well, it's with Mr. Garcia. I'm
3 not sure whether to call him in-house counsel or the head of
4 the DMCA committee.

5 THE COURT: Mr. Tropp, did you want to add
6 something? Go ahead.

7 MR. TROPP: I was trying to be responsive to Your
8 Honor's question, although I would in response to what Mr.
9 Oppenheim just said, say it doesn't matter what hat Mr.
10 Garcia was wearing at the time. He wasn't the lawyer in the
11 equation. It was David Weslow. Mr. Garcia was entitled to
12 seek legal advice from his outside counsel, no matter which
13 hat he was wearing.

14 MR. OPPENHEIM: I believe this exchange, Your
15 Honor, is Exhibit E to our filing, if that's helpful. You
16 can see -- I'm just pulling it up here. So, it -- the
17 exchange begins with an email from Mr. Elmore, who's an IT
18 engineer, and it's re: the DMCA Q4 2019 review. So, this
19 is before any litigation exists. No claims have been
20 asserted. And there's a back and forth. The first back and
21 forth actually with mister -- is between Mr. Elmore and Mr.
22 Levan and that's redacted, which I don't understand. The
23 two engineers are speaking to each other.

24 And then, it goes on. Now, it does copy Mr.
25 Garcia, but it also copies the other members, I guess, of

1 the DMCA committee talking about the problem of determining
2 who was responsible for certain infringement notices. And
3 you see that they're struggling with this issue and they
4 then kind of figure out lots of notices and then every --
5 they dial in Wiley Rein, outside counsel, and it's all
6 redacted. But this is before any litigation existed.

7 THE COURT: Well, they're entitled to confer with
8 their -- with outside counsel to get legal advice.

9 MR. OPPENHEIM: Of course.

10 THE COURT: I'm not breaking -- you'll excuse me,
11 based on what I consider to be a fairly flimsy showing, I'm
12 not overruling Frontier's objection of attorney-client
13 privilege with communications with outside counsel. And
14 outside counsel is entitled to, you know, develop facts from
15 not only inside counsel but other people with knowledge of
16 it. That I view is a different -- raising different issues
17 than an inside counsel who wears two hats as a business
18 person and as a lawyer.

19 MR. OPPENHEIM: I don't --

20 THE COURT: Let -- no, stop. I'm unpersuaded by
21 anything I've heard or seen that would lead me to overrule
22 an assertion of privilege by -- with respect to
23 communications with Frontier's outside counsel. I view that
24 issue -- I view that as very different from the issues of
25 assertion of privilege with respect to Mr. Garcia, what he

1 communicated to other members of the committee. You know,
2 and this is a circumstance where there are no notes, no
3 minutes. I don't know why. I'm assuming that members of
4 the committee would say, oh, we need to be consistent with
5 whatever policy we're going to apply.

6 If we're going to terminate this subscriber who's
7 had 15 notices, we can't then permit somebody with 40
8 notices to remain because we think we're getting more
9 revenues on -- you know, those internal discussions. No, I
10 -- so I -- with respect to communications with outside
11 counsel, the objection is overruled.

12 I'm not there yet with respect to Mr. Garcia's
13 communications and before him with Mr. -- I'll butcher the
14 name -- Greifzu was the way I wrote it down -- who was a
15 lawyer.

16 MR. OPPENHEIM: Your Honor --

17 THE COURT: But that still leaves me uncertain
18 about what to do with respect to, you say they were 1,800
19 privilege assertions, I think was the number I wrote down,
20 1,800 docs that they've asserted privileged.

21 MR. OPPENHEIM: And to be clear, Your Honor, we're
22 not claiming each and every one of those, right, is -- the
23 privilege should be waived in any way. But I think that
24 that the Court should be drawing some lines as to when they
25 -- on what they waived the privilege.

1 THE COURT: I need more facts.

2 MR. OPPENHEIM: So --

3 THE COURT: I need more facts. Based on letters
4 which are not evidentiary, and I read a lot of the cases
5 that are cited, not all of them. I didn't read Bilzerian
6 before. I will now. I'm not ready to rule. And one
7 question I have is, are you all about to spring for the cost
8 of an expert on attorney-client privilege who will do an in
9 camera review and make a recommendation to the Court with
10 respect to these communications?

11 I don't want to find myself in the position of
12 having reviewed a large number of allegedly privileged
13 documents and then having an argument somehow I become
14 tainted if I sustain, or if I overrule the privilege, it can
15 -- you know, it can be challenged on appeal. But assuming I
16 sustain it, I don't know what I'm going to get to read and I
17 am going to be the trier of fact on a lot of this. So, you
18 can do one of two things.

19 If you want to make a formal motion to compel and
20 support it with evidentiary material as well as legal
21 analysis, and they'll respond -- I'm not going to allow you
22 all -- a lot of time to do this -- I will rule. If you want
23 if you want to select, agree on an expert to review
24 allegedly privileged communications and make a report and
25 recommendation to the Court with respect to privilege, you

1 can -- we can go that direction.

2 MR. OPPENHEIM: May I --

3 THE COURT: Go ahead.

4 MR. OPPENHEIM: Sorry, I don't want to step on
5 your words, Your Honor.

6 THE COURT: No, go ahead.

7 MR. OPPENHEIM: First of all, I do want to correct
8 something I said before. I think I said there were four
9 depositions. I've been reminded, it's been six. And one of
10 the depositions is somebody else who has been in these DMCA
11 committee meet quarterly meetings, Mr. Murphy, and he
12 testified that Garcia made all the decisions, which is
13 consistent with everything we've seen, that it wasn't --
14 there wasn't decisions.

15 THE COURT: Do you have a transcript?

16 MR. OPPENHEIM: Pardon me?

17 THE COURT: Do you have a transcript of Mr.
18 Murphy?

19 MR. OPPENHEIM: We do. I don't have it handy, but
20 I can -- we can find it, Your Honor, and I'm sure one of my
21 colleagues will scurry for it right now as we're --

22 THE COURT: I -- look, we're at the point -- I try
23 very hard never to have to have discovery motions, and I
24 think I said early on the exception -- I didn't say motions,
25 I said briefing on privilege issues. This is one of those

1 privilege issues. I feel like I need a factual record,
2 evidentiary factual record on which to make a decision. If
3 you want to proceed with a formal motion, agree on a
4 relatively short briefing schedule and we'll proceed on that
5 basis and I'll do my best to resolve it, but I want a
6 factual record on which to do it.

7 The issue of a lawyer wearing two hats is a
8 complicated one. The one thing that Frontier is at
9 substantial risk if they withhold communications, not by
10 outside counsel with Garcia, but Garcia -- if they're
11 asserting privileged communications between Garcia and other
12 members of the committee, for example, on grounds of
13 privilege, they're at, I think, a fairly substantial risk
14 that I will preclude the testimony of Garcia on any issue at
15 trial.

16 I don't know. I have to see how things develop.
17 If they think he's a crucial witness for them at trial, you
18 know, they're on warning that they're going to operate on
19 their own risk. They're not going to decide on the eve of
20 the trial that now we'll produce all those communications
21 because we need Garcia to testify. That's not going to
22 happen. It's now or never. When I say now or never, but if
23 we don't run afoul of the privilege -- you made your record,
24 Mr. Oppenheim, and when we get close to trial, you may
25 prevail on this point.

1 The result will be a preclusion order that Mr.
2 Garcia can't testify. It -- they're not going to have
3 anything that sounds like reliance on defense of counsel
4 defense through Garcia when this stuff should have been
5 produced and full deposition now. I don't know that's going
6 to happen. It may not happen. But Frontier better
7 understand the risk if we go that way.

8 If you want to agree on having an expert to review
9 allegedly privileged material, we can do that. You will
10 split the cost, and the cost of that will be chargeable
11 depending on the outcome of the report and recommendation
12 and the ultimate decision of the Court. That's about as far
13 as I can go today with respect to this attorney-client
14 privilege issue with respect to Mr. Garcia.

15 If you want -- you know, if you take his
16 deposition and decide to make -- you know, that you think
17 that the transcript helps you make this point, fine. I'm
18 not saying that you have to file the motion next week, but
19 it's not going to be on the eve of trial either. I just
20 can't resolve this issue on this record.

21 MR. OPPENHEIM: I understand, Your Honor.

22 MR. TROPP: Your Honor, just as a point of
23 clarification -- this is Jonathan Tropp. I understood Your
24 Honor to say that Frontier does not have to produce the
25 communications with its outside counsel, which means that

1 that portion of the motion or the request is denied. Your
2 Honor said the objection is denied. I understand the Court
3 to sustain the objection --

4 THE COURT: They objected to the -- when I spoke
5 of objection, they asserted an objection to your assertion
6 of privilege. And I'm saying that with respect to the
7 communications with outside counsel on the record before me
8 now, that objection is overruled.

9 MR. TROPP: Thank you, Your Honor. I appreciate
10 the clarification.

11 THE COURT: All right. You want to address the
12 issue of the RFAs, Mr. Oppenheim?

13 MR. OPPENHEIM: Certainly, Your Honor. As an
14 initial matter, Your Honor, I do believe this issue is
15 right. The parties met and conferred about the type and
16 nature of Frontier's objections. The parties went through
17 in detail one of the RFAs, by way of example. There was no
18 need and -- nor would there be any time to go through all of
19 them and all of what's in there.

20 In that meet and confer, Frontier indicated --
21 Frontier's counsel indicated it had no intent to amend its
22 responses, any of them. But I do think that the letter
23 process here has been very helpful because Frontier's letter
24 exemplifies the approach that Frontier has taken throughout
25 the RFAs. So, let me give --

1 THE COURT: -- came back and they attached your
2 responses to RFAs and there's a plague on your house, too.

3 MR. OPPENHEIM: Well, let -- so I want to talk
4 about their RFAs, but let me just spell with this first.
5 So, they raised two questions with respect to the
6 plaintiffs' RFAs. One of them is a question about pricing
7 that was already -- there was already a motion to this Court
8 and this Court ruled in our favor because the plaintiffs
9 aren't the ones selling the recordings, right? It's
10 distributors.

11 So, they don't set the pricing and this was
12 explained and the Court ruled and denied the motion on that
13 basis. They chose not to move on any of the other RFAs at
14 the time, and the other, they complain -- other complaint
15 that they make about our RFAs is similarly unfounded because
16 they really do have a problem that they're asking us to
17 speak about what consumers are doing when the record
18 companies --

19 THE COURT: Let me stop you right there, because I
20 -- and this is something that -- I'm stopping you because I
21 agree with you.

22 MR. OPPENHEIM: Okay.

23 THE COURT: An RFA is not a proper device for
24 asking a party to agree or disagree with whatever third
25 parties may have thought or may not have thought.

1 MR. OPPENHEIM: Exactly.

2 THE COURT: Okay. That's --

3 MR. OPPENHEIM: No --

4 THE COURT: I'm firm on that. Okay.

5 MR. OPPENHEIM: We issued our RFAs in direct
6 response to a hearing we had with you, Your Honor, where you
7 told us we needed to narrow -- we as the -- as counsel
8 should work to narrow the issues as much as possible.

9 THE COURT: Stop. So, I'm looking at the Day
10 Pitney letter of May 29th. Mr. Twardy's letter. The last
11 paragraph where he says, "In fact, Frontier's denials were
12 proper. For example, as we told RCC's counsel on our call,
13 Frontier did not deny RFA one, 'on the basis that it has two
14 versions of its acceptable use policy.' Rather, Frontier
15 communicates its policy that its subscribers shall not
16 infringe third party copyrights in other ways as well,
17 including through Frontier's terms of service; thus,
18 Frontier properly denied RFA 1."

19 That's one of the few paragraphs of the letter I
20 agree with. I'm making a point to both sides. RFAs are not
21 a game where facially improper responses were provided with
22 the expectation of dragging out the process and ultimate
23 disclosure. I have always believed that RFAs deserve an
24 admit or deny response -- and bear with me. Reading Mr.
25 Oppenheim's May 28th letter on Page 2, carry over to top of

1 Page 3, Mr. Oppenheim quotes Frontier's response, which with
2 all due respect is gibberish. It's clearly improper.

3 You know, I remember as a practicing lawyer,
4 people would do everything they could to avoid admit or deny
5 an RFA, because they know that -- you know, in a jury trial,
6 opposing counsel wants to read it to a jury and they're
7 going to have a page of gibberish. Nobody's going to
8 understand what it means. Well, I'm not a jury. I'm a
9 judge. I understand. This is not acceptable to me.

10 It seems to me that again, based on Mr.
11 Oppenheim's May 28th letter RFAs 5, 7, 10, 11 are quite
12 clear and they call for admit or deny, and if you can't
13 admit or deny, you have to explain why. And now, I'm
14 switching to Day Pitney's May 29th letter which responds, I
15 think, to Mr. Oppenheim. You know, when you say in that
16 second paragraph that as with so many other requests for
17 Court intervention RCC's latest request is premature.
18 Indeed, the request is premature for two reasons, and you
19 give me a bunch of reasons.

20 This goes to both sides. If gibberish is given in
21 response to RFAs, take a deposition. If the deposition
22 reveals that the RFA sought responsive information -- and I
23 get gibberish as a response, there's going to be sanctions.
24 Okay? I'm tired. This case has got a lot to be done in
25 this case. It's going to proceed to trial.

1 RFAs -- you know, I agree completely with Judge
2 Kimba Wood's decision in Wiwa. It's pretty -- you know, she
3 sets forth pretty simple explanation about RFAs and I've
4 always followed that view and I just -- look, you're not
5 going to use this process, you know, give a bunch of junk in
6 response to an RFA instead of a clear admission or denial
7 and then say, okay, well, there's an obligation to meet and
8 confer and, you know, that takes weeks. And then there's
9 back and forth.

10 We're not on that schedule. Okay, we're on a
11 schedule where this case needs to be ready for trial in
12 October. So, you can all continue whatever behavior you
13 want, but it may well result in the imposition of sanctions.
14 Okay. I don't believe in sanctions. I believe the parties
15 ought to play the game by the rules. The rules aren't, oh,
16 give a lengthy objection to an RFA and expect to meet and
17 confer, and the other side can't raise it until we completed
18 the meet and confer. Forget it. It's a message to all of
19 you, okay.

20 To go back specifically to Mr. Oppenheim's May
21 28th letter, we would refer on Page 2, okay, RFAs 5, 7, 10,
22 and 11, and then where he quotes, you know, substantially
23 the same response to all of them. It's unacceptable. It's
24 really as simple as that. Fix it, okay? If you have to
25 have a quick meet and confer to say, okay, we'll play by the

1 judge's rules, fine. But it's going to start costing
2 everybody money if it -- this game continues. It's just not
3 -- that's not the game.

4 So, you know, Mr. Oppenheim's May 28th letters at
5 the bottom, in ii on that page, "Frontier obfuscates its
6 answers with unnecessary qualifications regarding its
7 residential and commercial acceptable use policies." You
8 quote RFA 1 and you quote Frontier's response.

9 I guess I read the response differently than you
10 did, Mr. Oppenheim. I read their response as saying, we
11 have two policies, residential acceptable use policy and
12 commercial acceptable use policy. And the response, "Admit
13 that on May 1, 2019 through December 31, 2023 the only
14 policy related to copyright infringement that Frontier
15 communicated to subscribers was Frontier's acceptable use
16 policy."

17 I read their response saying there actually were
18 two acceptable use policies and our answer is no, that's not
19 the only thing we communicated. That, to me, is responsive.

20 MR. OPPENHEIM: May I, Your Honor?

21 THE COURT: Go ahead.

22 MR. OPPENHEIM: I completely disagree with you.

23 THE COURT: Well, we --

24 MR. OPPENHEIM: Here's why. Because the issue
25 here is under the safe harbor, the question is whether they

1 communicated a repeat infringer policy to their subscribers.
2 I don't care whether they communicated a residential
3 acceptable use policy to residential subscribers and a
4 commercial acceptable use policy to commercial subscribers.
5 That still would be an admit within the RFA we issued. They
6 could have -- they could have said we admit, but only the --
7 we have a residential one that goes to residential customers
8 and we have a commercial one that goes to commercial
9 subscribers, but they're both acceptable use policies and --

10 THE COURT: Let me ask you this. So, they say
11 they're terms of use. I don't have the terms of use in
12 front of me. I thought I read somewhere in one of these
13 letters, and they say their terms of use communicate an
14 acceptable use policy. So, they say they deny that the only
15 thing they ever sent to subscribers was their acceptable use
16 policy. They say, we have two of them and we deny that
17 those are the only things we sent to subscribers. Okay,
18 it's either true or not true. Okay? Prove them false.

19 MR. OPPENHEIM: The terms of use are the
20 contractual agreement with the subscriber. That's not your
21 policy. The terms of use incorporate and adopt policies.

22 THE COURT: I don't know. Do the terms of use
23 include something that's the equivalent of an acceptable use
24 -- you know, the terms of use say, it's not permissible to
25 infringe copyrighted material.

1 MR. OPPENHEIM: Your Honor, I believe -- and I'll
2 be corrected, I'm sure by Mr. Tropp if I'm wrong here --
3 that the terms of use just simply adopt and incorporate the
4 acceptable use --

5 THE COURT: I don't know what's in the terms of
6 use.

7 MR. OPPENHEIM: But what I'm trying -- what we
8 were trying to narrow here is a very clean fact of what they
9 communicated to their subscribers to fulfill the obligation
10 under the safe harbor. And we believe that the thing that
11 they're going to point to is the acceptable use policy. We
12 don't believe that fulfills the requirements of the statute,
13 but that's what we're trying to figure out.

14 THE COURT: So, you know, there are consequences
15 to denying an RFA that you established through a deposition
16 is true. Take the deposition. Take a 30(b)(6) deposition
17 on this issue. Establish that their answer was inaccurate
18 and seek sanctions. What can I tell you?

19 MR. OPPENHEIM: Your Honor, the -- I think the
20 third part of our letter on this or our motion on this is
21 that they just -- they decided to include in all of their
22 responses their advocacy as opposed to just --

23 THE COURT: -- the point that I tried to make
24 clearly and maybe I didn't, okay. The response to an RFA is
25 admit or deny, and if they deny and you prove that it's not

1 accurate, there are consequences. Okay? I can't -- look.
2 What I -- the -- your May 28th letter on Page 4, you quote
3 Frontier's response. It's what I put as the gibberish.
4 It's unacceptable to me. Okay? So, fix it or not, and
5 don't fix it and run the risk of bad things happening.
6 Okay?

7 This is not how the game, the RFA game is going to
8 be played. May be what you do in other cases. It may be
9 what you do with other judges. You're not going to do it
10 with me. I don't know how to say it. That -- I said it
11 before. I'll say it again. You know, you cite Wiwa again.
12 I agree Kimba Wood's decision on Wiwa. I've seen this over
13 and over. It's been frustrating to me for years that I get
14 these crazy inappropriate responses to RFAs because, you
15 know, everybody is looking for wiggle room. Okay.

16 They want to -- they want do that, I'll strike the
17 -- I'll strike the response. I'll, you know, the rules
18 allow me to, you know, deem admitted what you said. I can
19 impose sanctions. I don't want to do any of that. I want
20 you to play by the rules. What I don't want to see is a
21 paragraph that you quote for Frontier's response on Page 4.
22 It's junk. It's not an appropriate response. My note to
23 myself is, does not fairly respond to RFA. It doesn't.

24 So, what you all need to tell me is coming back to
25 the privilege issue, how you want to proceed. Do you want

1 to make a formal motion? Do you want to take the deposition
2 first of one of these people? Do you want to make a formal
3 motion to compel and I'll decide, and they can put in a
4 response -- agree on a briefing -- tight briefing schedule
5 and I'll resolve it.

6 If you all want to agree on an attorney-client
7 privilege expert to review the allegedly privileged material
8 and report, you'll split the cost and the Court will be --
9 and the cost will be (indiscernible). You need to let me
10 know by the middle of next week how you want to proceed.

11 MR. OPPENHEIM: May I ask --

12 THE COURT: -- take the deposition, you can do
13 that.

14 MR. OPPENHEIM: May I ask a question, Your Honor?

15 THE COURT: Sure.

16 MR. OPPENHEIM: So, I believe fact discovery
17 concludes in roughly two weeks. And I think I could fairly
18 say for every lawyer on this call. We are all 100 percent
19 engaged on a huge number of depositions between now and
20 then. And -- including Mr. Garcia's, Mr. Elmore, and Mr.
21 Levan's. would it be acceptable to the Court if we chose to
22 take this route, to file the motion shortly after Mr.
23 Garcia's deposition, which would be shortly after the close
24 of fact discovery?

25 THE COURT: (indiscernible).

1 MR. OPPENHEIM: I'm sorry.

2 THE COURT: I want you to get your depositions
3 done.

4 MR. OPPENHEIM: Okay.

5 THE COURT: Yes, it would be acceptable to me for
6 you to file the motion then.

7 MR. OPPENHEIM: Okay. Thank you, Your Honor. And
8 we will consult with our clients and confer internally and
9 confer with opposing counsel as well. Do you want us to let
10 you know how we choose to proceed by letter or just --

11 THE COURT: Send a letter to the Court.

12 MR. OPPENHEIM: Okay. Very well.

13 THE COURT: So, next -- we're losing track of the
14 days. Hang on. Next Tuesday, Wednesday, and Thursday is
15 the Second Circuit Judicial Conference. I will have a
16 computer with me and I'll be able to read whatever response
17 you want to have. Okay? I should say -- and on Friday, I'm
18 on a very, very long flight out of the country. Don't take
19 that as an invitation to -- whatever.

20 MR. OPPENHEIM: Are you saying you're going to
21 have lots of time to read really lengthy motions, Your
22 Honor?

23 THE COURT: I won't have time to get it. It's a
24 17-hour flight.

25 MR. OPPENHEIM: Oy. We'll get something in.

1 THE COURT: Is there anything else we need to talk
2 about today?

3 MR. OPPENHEIM: Not from the record company
4 claimants.

5 THE COURT: From Frontier?

6 MR. COHEN: No, Your Honor. Thank you for your --

7 MR. TROPP: Yes, Your Honor. Sorry. Your Honor,
8 as Mr. Oppenheim --

9 THE COURT: -- name so we have a clear record.

10 MR. TROPP: Jonathan Tropp for Frontier. Your
11 Honor, as Mr. Oppenheim mentioned, the parties are engaged
12 in taking a very large number of depositions in order to
13 complete them all by the fact discovery deadline of June
14 13th. There is one deposition that we have had trouble
15 scheduling, to be completed by the Thursday, June 13th that
16 the parties have agreed to do on Friday, June 14th, but I
17 wanted to make sure that Your Honor had no objection --

18 THE COURT: That's acceptable to me. Well, look,
19 let me just say, I certainly experienced this all the time
20 as a litigator. It's just -- there's cleanup discovery that
21 has to be done. There are witnesses, there are schedules,
22 and all that. If you agree -- and, you know, good
23 litigators agree. They work these things out. It's
24 acceptable to me. Okay.

25 MR. TROPP: Thank you, Your Honor.

1 THE COURT: Okay. Have fun with all of your
2 depositions. We're adjourned.

3 MR. COHEN: Thank you, Your Honor. Safe travels.

4 MR. OPPENHEIM: Thank you, Your Honor.

5 MR. TROPP: Thank you, Your Honor.

6 CLERK: Jonathan, you can stop the recording.

7 (Whereupon these proceedings were concluded at
8 4:26 PM)

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C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing
transcript is a true and accurate record of the proceedings.



Sonya Ledanski Hyde

Veritext Legal Solutions

330 Old Country Road

Suite 300

Mineola, NY 11501

Date: May 31, 2024